

CHANNEL VENTILATED CIGARETTES - BARCLAY

A report on the legal developments

23 March 1987

The Barclay brand of cigarettes is manufactured by Brown and Williamson Tobacco Corporation (B&W) in the United States and by other affiliates of British-American Tobacco Company Ltd. (BAT) in other countries. Barclay was first launched in the United States in 1981 and, subsequently, in six European countries and six GCC member states.

The Barclay cigarette is characterized by the so-called "Actron" filter which provides ventilation through four peripheral channels which are isolated from the core of the filter. When a human being smokes this cigarette, his lips inevitably block some of the peripheral channels, so that the cigarette delivers significantly greater amounts of tar when smoked by human beings than when tested on a smoking machine. This does not happen with cigarettes that have a conventional filter.

Governmental authorities in the United States, Germany, Switzerland and Norway have found Barclay's 1 mg tar claim to be inaccurate and misleading and, in these countries, Barclay is prohibited from being sold as a 1 mg cigarette. In France, Italy and Sweden the state tobacco companies have refused to distribute Barclay, and in the United Kingdom Barclay was never launched with the "Actron filter".

This report summarizes the legal and administrative action taken against Barclay in those countries where the 1 mg numbers are prohibited.

The United States

In January 1981, Barclay was launched nationally in the United States with an extensive advertising campaign that emphasized its Federal Trade Commission (FTC) rating of 1 mg tar.

In June 1981, the FTC began an informal investigation involving all U.S. cigarette companies, including B&W, in order to determine whether or not the testing method used by the FTC properly rated the Barclay as a 1 mg cigarette.

Philip Morris Incorporated and R.J. Reynolds Tobacco Company argued that the FTC method was inappropriate for cigarettes with "Barclay-type" filters and that the 1 mg claim was inaccurate and misleading. Their evidence showed that the Barclay filter differs from a conventional filter in that when the Barclay cigarette is smoked between human lips its air ventilation system is inevitably obstructed and the cigarette delivers disproportionately more tar and nicotine than other comparably rated cigarettes. Because the FTC smoking machine does not reproduce this obstruction caused by human lips, it was argued that Barclay could not be accurately rated against cigarettes of conventional filter design, which are not vulnerable to obstruction in this way.

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In June 1982, the FTC concluded that Barclay was inaccurately measured by the FTC method and that the cigarette actually delivered between 3 mg to 7 mg of tar when smoked by the human being.

The Commission acted immediately to withdraw Barclay from its testing program and directed B&W to refrain from relying on the FTC method to substantiate its 1 mg tar claim. Then followed a series of proceedings and lawsuits between B&W and the FTC in which the FTC took the position that Barclay could not be rated as delivering 1 mg of tar.

The FTC made the following announcement:

"...the Commission has determined that its present testing methodology for "tar", nicotine, and carbon monoxide does not measure accurately Barclay cigarettes...(and that)...it will not accept test results based on the current FTC method as substantiation for claims made about the "tar", nicotine, and carbon monoxide content of all varieties of Barclay cigarettes." (FTC News Release, 13 April 1983)

In June 1983, the U.S. Court of Appeals for the Sixth Circuit upheld a decision of the U.S. District Court for Western Kentucky, which had refused to restrain the FTC from excluding Barclay from its official testing and reporting program.

In October 1983, the FTC obtained an injunction from the U.S. District Court for the District of Columbia prohibiting B&W from using the "1 mg tar" claim on its packaging or in any advertising. In its judgment, the Court concluded that

"...the preponderance of the evidence demonstrates that Barclay is in fact improperly rated 1 mg by the FTC method and that any claim that Barclay is a 1 mg cigarette is deceptive." (Memorandum, dated 14 October 1983, by Judge Gesell of the U.S. District Court for the District of Columbia, FTC v. B&W, 580 F.Supp. 981, at page 989.)

A modified judgment in April 1986 revised the original injunction by prohibiting B&W from representing any tar values for Barclay, including the 1 mg rating, in any advertising, packaging or labeling, unless the tar rating was approved or accepted by the FTC, or was derived using a test method approved for Barclay or using a new testing method (provided test results were given for competing brands and it stated that the new method was different from the FTC method).

From 1983 until 1986, Barclay was sold in the United States without showing any number for tar on the pack or in its advertising. Then, in July 1986, B&W submitted to the FTC a Barclay with a significantly modified filter, and obtained for the product a rating of 3 mg tar.

Today, in the United States, the modified Barclay is advertised and sold with the 3 mg tar rating, but the original Barclay, which B&W claim should be rated as a 1 mg cigarette, is no longer available.

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Germany

In the Federal Republic of Germany, the declaration of contents of cigarettes is required by the Tobacco Ordinance 1983 according to the DIN standards (The German Industry Standards).

BAT launched the Barclay cigarette in the Federal Republic in the autumn of 1984, under the name "Barclays" for trademark reasons. Barclays was advertised as "the first strong cigarette which is a light cigarette ... with particularly low values : 1 mg tar/0.2 mg nicotine (average numbers according to DIN)."

Three tobacco companies promptly began legal actions against BAT on the basis that the 1 mg claim was misleading to the consumer contrary to the German Food Law and the Law on Unfair Competition.

On 11 December 1984, and again on 21 December 1984, the Regional Court of Cologne issued an injunction restraining BAT from citing the 1 mg number in any advertising, from linking this figure to the "light cigarette" claim, and from distributing the product with 1 mg on the pack.

In granting the injunction, the Court found that

"...evidence has been presented to the satisfaction of the Court that the values (for Barclays) which the Defendant (BAT) determined formally according to DIN...are in practice so much higher that their isolated indication and...their advertising is to be described as misleading...." (Unofficial translation from the German language, Judgment of Cologne Regional Court in R.J. Reynolds GmbH v. BAT Cigaretten-Fabriken GmbH, 11 December 1984)

Stimulated by the litigation and the escalating public controversy against Barclays, the Federal Health authorities acted by instructing the German Standards Committee (the DIN Committee) to establish a new testing procedure for measuring "Barclay-type" cigarettes. The DIN Committee established the Preliminary testing standard (DIN 10 240 part 4, also known as the "VORNORM") for channel-ventilated cigarettes, which came into effect on 1 April, 1985.

On 11 April 1985, the German manufacturers reached agreement with BAT to settle the litigation, and BAT formally recognised and agreed to implement the VORNORM for the Barclays cigarette.

According to the VORNORM, Barclays is now rated in Germany as 6 mg tar and 0.6 mg nicotine and these are the figures stated on its pack.

Switzerland

Barclay was launched in Switzerland by BAT (Suisse) S.A. in October 1982. Four other Swiss cigarette manufacturers began legal proceedings in the Geneva Cantonal Court based on unfair competition and, on 29 June 1984, the Court issued a preliminary injunction prohibiting BAT from using the 1 mg tar and 0.2 mg nicotine claims on the pack and in its advertising.

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The Court reasoned its decision as follows :

"The evidence ... makes it highly probable that ISO Standard 3308 is not able to correctly measure the tar content of cigarettes with a peripheral ventilation filter, and it may even be supposed that the specific structure of the "Actron" filter of Barclay cigarettes was designed with the objective of favoring an objectively false analysis of the product. (underlining added)

"It is therefore necessary to accept as very probable that Barclay cigarettes deliver higher quantities of tar and nicotine than those indicated on the packaging, when they are smoked by a human." (Unofficial translation from the French language of the Judgment by the Third Section of the Court of Justice, Republic and Canton of Geneva, at pages 4 and 5.)

This decision was appealed and upheld by the Swiss Federal Tribunal (the highest Swiss Court) on 2 November 1984.

Since Swiss law requires the printing of tar and nicotine numbers on all cigarette packs, the Swiss Federal Office of Public Health has prescribed that BAT display two sets of numbers for tar and nicotine for Barclay -- one set resulting from ISO testing with ventilations channels open and a second set with all ventilation channels blocked. Court proceedings are still continuing, but BAT now sells Barclay in Switzerland with the following double indication on the pack :

"Tar 1 mg. Nicotine 0.2 mg.
If ventilation blocked : Tar 9 mg. Nicotine 1.1 mg."

Norway

Barclay was launched in October 1983 at a time when tar and nicotine values were not shown on cigarette packs.

In January 1984, constituent labelling for tobacco products in Norway was introduced and Barclay's declaration as a 1 mg cigarette came to the attention of the Norwegian authorities.

The Norwegian Ministry of Social Affairs immediately referred Barclay to its advisory council, the National Council on Smoking and Health (Tobakkskaderad), which began investigations involving the Finnish Testing Laboratory (VTT) and an independent expert from the World Health Organisation, Professor Richard Frecker of Canada. Both the VTT and Professor Frecker gave evidence that Barclay is not a 1 mg cigarette and the Council reported its findings to the Norwegian Directorate for Public Health.

In proposing a change in Norwegian testing regulations for "Barclay-type" cigarettes, the Health Directorate stated :

"In the opinion of the Directorate, the current testing method will in all probability give incorrect information concerning the contents of the smoke the cigarette smoker is exposed to from this type of cigarette."

On 18 December 1985, the Public Health Directorate notified cigarette manufacturers that the German DIN testing standard (VORNORM) for channel-ventilated cigarettes (i.e., the Barclay-type) was to be adopted in Norway.

The new regulations took effect on 1 May 1986, and Barclay is now obliged to declare the same tar and nicotine values for Barclay in Norway as in Germany, namely, 6 mg tar and 0.6 mg nicotine.

Benelux and Finland

BAT has launched Barclay in the Benelux and Finland with claims of 1 mg tar and 0.2 mg nicotine. Objections have been made to the various government authorities.

France, Italy, Sweden and the United Kingdom

Barclay has not been introduced in France, Italy or Sweden. In all of these countries, the Government-owned tobacco companies have refused to distribute Barclay.

In the United Kingdom, BAT did not launch Barclay with the Actron filter after the competent authorities made it clear that the 1 mg rating would not be accepted. The British Barclay was launched with a conventional filter without peripheral channels, but it is no longer sold in the U.K.

Conclusion

The foregoing provides a summary of the legal and administrative action against Barclay in those countries where its 1 mg claims are not permitted. All documents and court decisions cited in this section are available on request.

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